U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30681097

Date: MAY 06, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Extraordinary Ability)

The Petitioner, a dancer, seeks classification as an alien of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, concluding that while the record showed that the Petitioner met the initial evidence requirement for this classification by meeting at least three of the evidentiary criteria under 8 C.F.R. § 204.5(h)(3), it did not establish that she possessed the requisite sustained national or international acclaim to demonstrate her eligibility as an individual of extraordinary ability. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

To establish eligibility as an individual of extraordinary ability, a petitioner (or anyone on the petitioner's behalf) must establish that they:

- Have extraordinary ability in the sciences, arts, education, business, or athletics;
- Seek to enter the United States to continue work in their area of extraordinary ability; and that
- Their entry into the United States will prospectively substantially benefit the United States.

Extraordinary ability must be demonstrated by evidence of sustained national or international acclaim as well as extensive documentation that their achievements have been recognized in the field. Section 203(b)(1) of the Act.

The implementing regulation further states that the term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." It also sets forth a multi-part analysis. A petitioner can demonstrate international recognition of their achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If such evidence is unavailable, then they must alternatively provide evidence that meets at least three of the ten listed criteria, which call for evidence about other awards they may have received, published material about them in qualifying media, and their authorship of scholarly articles, among other types of evidence. 8 C.F.R. §§ 204.5(h)(2),(3).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination, assessing whether the record shows that the individual possesses the acclaim and recognition required for this highly exclusive immigrant visa classification. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

II. ANALYSIS

The Petitioner is a dancer who performs in the area of contemporary dance. She earned a master of fine arts degree in dance from the [redacted] in 2008, and has participated in several dance workshops and residencies. She states that she intends to continue performing contemporary dance in the United States as a solo artist and as part of a troupe.

In his decision, the Director concluded that the Petitioner met six of the ten evidentiary criteria:

- 8 C.F.R. § 204.5(h)(3)(i), Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor,
- 8 C.F.R. § 204.5(h)(3)(ii), Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields,
- 8 C.F.R. § 204.5(h)(3)(iii), Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought,
- 8 C.F.R. § 204.5(h)(3)(iv), Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought,
- 8 C.F.R. § 204.5(h)(3)(vii), Evidence of the display of the alien's work in the field at artistic exhibitions or showcases, and
- 8 C.F.R. § 204.5(h)(3)(viii), Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

We agree that the record establishes that the Petitioner has met at least three of the evidentiary criteria, and thus meets the initial evidence requirements for classification as an individual of exceptional ability.[1]

A. Final Merits Determination

As noted above, once an individual has established that they meet the initial evidence requirement, we conduct a final merits determination. In a final merits determination, we examine and weigh the totality of the evidence to determine whether an individual has sustained national or international acclaim and is one of the small percentage at the very top of their field of endeavor, and that their achievements have been recognized in the field through extensive documentation. As extraordinary ability is an elite level of accomplishment whose recognition necessarily entails a judgement call, it cannot be established through meeting at least three of the evidentiary criteria alone. The final merits determination is the ultimate statutory inquiry of whether the applicant has extraordinary ability as demonstrated by sustained national or international acclaim. *Amin v. Mayorkas*, 24 F.4th 383, at 395 (2022).

Here, the Director noted that although the record includes substantial evidence relating to the Petitioner's ability and career as a dancer up to 2014, such as articles about her and her work and her receipt of awards and selections to participate in artistic residencies, there was no evidence regarding performances, or indicia of acclaim or recognition, after 2014. Similarly, although the Petitioner provided recently-dated reference letters from her colleagues and other experts in the field of contemporary dance, the Director noted that they referred to her accomplishments from 2014 or earlier. Based on this, the Director concluded that the Petitioner had not established that she had enjoyed sustained acclaim as a dancer at the national or international level.

We note that one of those reference letters, from C-M-, Vice President of Programming for the [redacted] was nearly identical to a letter in the record that he wrote in support of the Petitioner's petition for O-1 nonimmigrant status more than a decade earlier. This underscores that this individual was not aware of any further achievements made by the Petitioner as a dancer since he wrote his initial letter. While he, and the other letter writers who had previously written letters on the Petitioner's behalf, can be understood to have renewed their endorsements of her, none of them focus on more recent accomplishments or contributions made by the Petitioner to the field of contemporary dance. They are thus insufficient to show that she had sustained the acclaim she achieved before 2014 in the intervening period, particularly in light of the lack of other evidence in the record concerning the Petitioner's acclaim and recognition during that period.

When responding to the Director's NOID, the Petitioner included new evidence showing that she had recently joined new dance projects which were set to occur or debut in the future. This evidence responded to the Director's concerns about whether she intended to continue in her area of expertise, as he had focused on her decision to study classical Chinese medicine and related areas beginning in

[1] The Director stated in his notice of intent to deny (NOID) that the Petitioner also met the criterion at 8 C.F.R. § 204.5(h)(3)(v), relating to her original contributions of major significance to her field. Without explanation, the Director did not indicate that she met this criterion in his decision. Because the Petitioner has established that she meets at least the required three of the evidentiary criteria, we will not address the evidence of her original contributions separately in our decision, but will consider it as part of the totality of the record in the final merits determination.

2014. Although this evidence served to support the Petitioner's stated intention to continue in her career as a dancer in the United States, it did not resolve the issue of a gap of more than eight years during which the Petitioner did not perform, win awards, review the work of others, or have articles about her published in professional or major media.

On appeal, the Petitioner initially states that her decision to study classical Chinese medicine is common in the dance and performance arts fields, where artists pursue "other somatic, i.e. relating to the body, disciplines." In support of this assertion she submits new evidence for the first time on appeal, including a new letter from R-W-, a renowned theater artist and founder of an artist residency program in which the Petitioner participated. This also includes a list of passages taken from the online biographies of some of the letter writers, all discussing the writers' study of somatic techniques. But where, as here, a Petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The Director's NOID provided the Petitioner with notice of his concerns regarding this period of her career, and the Petitioner timely responded.

Further, even if we were to consider this evidence in addition to the Petitioner's initial filing and NOID response, it does not cure the deficiency discussed in the Director's decision. We acknowledge that dancers and other artists frequently do not pursue conventional or linear career paths, and that they may take time away from performing or creating to develop their craft. But to demonstrate eligibility as an individual of exceptional ability, they like all petitioners must establish that not only have they achieved national or international acclaim, but that that acclaim has been sustained. In addition, eligibility for classification as an individual of extraordinary ability must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Here, the record shows that at the time the Petitioner filed her petition, she had been studying Chinese medicine, meditation, and tai chi for several years, and that that activity, even if related to her field of expertise, did not garner her the acclaim and recognition she had previously received while performing as a contemporary dancer.

The Petitioner next asserts that after completing her studies, the COVID-19 pandemic and the worldwide efforts to mitigate its effects made performance impossible for those in her field. As the pandemic's impact on those in the arts and entertainment fields, as well as many others, is common knowledge, we have taken that impact into consideration in making our determination. But even prior to the pandemic's beginnings in early 2020, the Petitioner had already not performed in her field for many years, and the evidence does not show that she had sustained her previous acclaim in that period.

Finally, the Petitioner states that she has "been spending time researching drafting plans and exploring choreographic approaches for [her] new performance piece," [redacted] While she also mentioned this project when responding to the Director's NOID, the record does not include any evidence concerning its development. More importantly, the record does not show that the Petitioner's ongoing work has garnered acclaim for a performance piece she does not expect to debut until the autumn of 2025.

B. O-1B Nonimmigrant Status

We acknowledge that the Petitioner has previously worked in O-1B status and held that status at the time of filing this petition, and that this classification is reserved for nonimmigrants of extraordinary ability in the arts. Although USCIS has approved at least three O-1 nonimmigrant visa petitions filed on behalf of the Petitioner, the prior approvals do not preclude USCIS from denying an immigrant visa petition which is adjudicated based on a different statute, regulations, and case law. The nonimmigrant and immigrant categories have different criteria, definitions and standards for persons working in the arts. "Extraordinary ability in the field of arts" in the nonimmigrant O-1 category means distinction. 8 C.F.R. § 214.2(o)(3)(ii). But in the immigrant context, "extraordinary ability" reflects that the individual is among the small percentage at the very top of the field. Moreover, each petition is separate and independent and must be adjudicated on its own merits, under the corresponding statutory and regulatory provisions.

III. CONCLUSION

The Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for those progressing toward the top. USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994). Here, the Petitioner has not shown that the significance of her work is indicative of the required sustained national or international acclaim or that it is consistent with a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A) of the Act. Moreover, the record does not otherwise demonstrate that the Petitioner has garnered sustained national or international acclaim in the field, and that she is one of the small percentage who have risen to the very top of the field of contemporary dance. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2). We therefore agree with the Director's conclusion that the Petitioner has not established her eligibility as an individual of extraordinary ability

ORDER: The appeal is dismissed.